



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

**SENSITIVE**

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 5619  
Tenaflly Democratic Campaign 2004 )

**The Tenaflly Two**

**Statement of Reasons**

The Borough of Tenaflly, New Jersey, "predominantly a residential community" of 13,806 situated 6 miles north of the George Washington Bridge, is home to the Northern Valley Fire Chief's Parade and an annual "Turkey Shoot" (held inside Borough Hall, darts only, no firearms). In mid-November visitors to the Borough web site<sup>1</sup> were advised that Borough offices would be closed for Thanksgiving.

Tenaflly is governed by a Mayor and Borough Council. The first items on a recent borough Council agenda were review of a fiscal statement, a proposal to establish a sister city relationship with Cape Palmas, Liberia, temporary signs for a rug auction at St. Thomas Armenian Church, and a street closing for the Chamber of Commerce October Fall Festival.<sup>2</sup>

A few weeks prior to the Turkey Shoot the borough conducts Council elections (using ballots, not bullets). In 2004, 8,875 registered voters decided narrowly to elect Republican challenger Robert Thompson to the Tenaflly Borough Council and to return incumbent Democratic Councilman Patrick Rouse, while ousting Democratic incumbent Shama Haider (who trailed Rouse by only 26 votes) and rejecting Republican challenger Jeffrey Thompson (who fell only 162 votes short of Haider).<sup>3</sup>

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<sup>1</sup> [www.tenafllynj.org](http://www.tenafllynj.org)

<sup>2</sup> Regular Meeting of the Mayor and City Council, Borough of Tenaflly at 1 (Sept. 13, 2005), available at <http://www.tenafllynj.org/filestorage/68/464/09-13-05-Minutes.pdf> (visited Dec. 1, 2005).

<sup>3</sup> [www.tenafllynj.org](http://www.tenafllynj.org).

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An apparently disappointed Mr. Jeffrey Thompson filed a complaint alleging "multiple violations" of election law. The complaint was not filed with Borough officials, nor with Bergen County (which includes the borough and manages its elections),<sup>4</sup> nor yet with state officials in Trenton. Jeffrey Thompson lodged his complaint concerning the municipal election in Tenaflly, New Jersey, with the United States Federal Election Commission in Washington, D. C.

While we concur in the General Counsel's recommendation to dismiss this complaint "in light of the *de minimus* nature of the allegations," we write to explain why the Federal Election Campaign Act and federal courts may soon compel the United States Federal Election Commission in Washington, D. C., to intrude in local election activities of the type and magnitude underlying this complaint.

Extension of the Federal Election Commission's regulatory oversight to the Internet has received much attention. Yet the impending imposition of federal campaign finance regulations on longstanding, and in our view benign, local campaign practices could be far more consequential for local campaigns and political parties. Local officials would do well to emulate the Internet community in asking Congress to review this decision.<sup>5</sup> Congress itself should review whether activities of the nature and magnitude described in this complaint should be or ever were intended to be brought within the ambit of Federal election law.

### Complaint

The gravamen of Thompson's complaint is that Rouse and Haider, "operating under the name Tenaflly Democratic Campaign," engaged in a deliberate effort to associate themselves with the entire Democratic ticket on the ballot in November 2004, including Congressional nominee Anne Wolfe and Presidential nominee John Kerry.<sup>6</sup> In the process, Thompson alleges, "state money was used to campaign for federal candidates." This scheme included a billboard and a one-page mailing. The billboard pictured Haider and Rouse, and included an exhortation to "vote Democratic." Pasted to one corner of the billboard was a Kerry/Edwards bumper sticker. Affixed to a steel post holding the billboard was a Kerry/Edwards yard sign. The mailing advocated re-election of Haider and Rouse and urged support for the entire Democratic ticket with check marks

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<sup>4</sup> Candidates for Tenaflly Mayor and Council 2006: General Election, Tuesday, November 8, 2005, available at <http://www.tenafllynj.org/content/56/96/824/default.aspx> (visited Dec. 1, 2005).

<sup>5</sup> See generally Online Freedom of Speech Act, H. R. 1606, 109th Cong. (2005).

<sup>6</sup> Perhaps what the complaint alleges is a legally suspect effort to attach themselves to John Kerry's coattails allowed Haider and Rouse to best Jeffrey Thompson in the election, but Robert Thompson's success would seem to point elsewhere for an explanation.

next to the names "John Kerry for President" and "Anne Wolfe for Congress." Thompson also charges that Haider and Rouse failed to disclose properly who paid for the mailing. Thompson, however, seems pretty sure Haider and Rouse did it themselves, since he filed a complaint against them for it.

## The Law

The Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"), as amended by the Bipartisan Campaign Reform Act ("BCRA") mandates that funds used by "a local committee of a political party" or by "an association or similar group of candidates for State or local office" for "Federal election activity" ("FEA") be made with "funds subject to the limitations, prohibitions, and reporting requirements of [FECA]." *Id.* § 441i(b)(1) (2002). Individual candidates for state or local office face the same requirement for funding communications that promote or support candidates for federal office. *Id.* §§ 441i(f)(1), 431(20)(A)(iii) (2002).

FEA includes, *inter alia*, a "public communication" that "promotes or supports" a candidate for Federal office. *Id.* § 431(20)(A)(iii). "Public communication" in turn includes a communication by means of any "outdoor advertising facility, mass mailing ... or any other form of general public political advertising." *Id.* § 431(22). "Mass mailing" means a mailing or fax "of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." *Id.* § 431(23).

FECA limits contributions to candidates to no more than \$2,100 per person per election, and prohibits contributions from corporations, labor unions, foreign nationals, national banks and Federal government contractors. *See id.* § 441a(a)(1)(A), (c) (2002). The reporting requirements, *id.* § 434 (2004), of the FECA mandate detailed statements of receipts and disbursements filed with the Commission on a quarterly or monthly and pre- and post-election schedule. The phrase "reporting requirements" is also generally construed to encompass the registration requirement, *id.* § 433 (1980), triggered for political groups once they have raised or spent more than \$1,000 in regulated funds. *See id.* § 431(4)(A). Commission regulations require registered committees' disbursements for public communications that identify federal candidates or political parties be from accounts containing only these Federally-eligible and reported funds. 11 C.F.R. § 106.7(b) (party committees); *id.* § 106.7(a) (noncoordinated committees); *see generally id.* § 106 (allocation).<sup>7</sup>

FECA-registered committees are required to include specified disclaimer statements on their public communications. 2 U.S.C. § 441d (2002).

<sup>7</sup> Another regulatory provision probably not applicable to the communications at issue here allows registered committees to reimburse their "Federal" account from a "non-Federal" account for portions of certain expenses, or to maintain a third "allocation" account into which funds from Federal and non-Federal accounts are transferred in proportion to the required expense allocation.

## Analysis

The complaint alleges that the "Tenaflly Democratic Campaign" ("TDC") was a joint effort of Council candidates Haider and Rouse. The New Jersey Election Law Enforcement Commission reports that Haider and Rouse raised and spent all of their campaign funds through a joint candidate committee, the TDC.<sup>8</sup> TDC appears to be separate from the Tenaflly Democratic Municipal Committee, the relevant local committee of the Democratic Party.<sup>9</sup> Though the Commission has not addressed the issue through regulations or in enforcement decisions, it does appear that the TDC is an association or group of candidates for local office. Alternatively, the two candidates would also be considered local candidates under 2 U.S.C. § 441i(f).

The billboard identified in the complaint appears to qualify as an "outdoor advertising facility." Whether the bumper sticker and yard sign were added by agents of the TDC or by others may be factually disputed.<sup>10</sup> If the TDC were not responsible for the Kerry signs it is unclear whether the "vote Democratic" exhortation would constitute a get out the vote ("GOTV") effort otherwise subject to FECA limits. The mailing, however, with its check marks next to the names Kerry and Wolfe, clearly promotes those Federal candidates. While the mailing appears to be aimed solely at registered Democrats, with nearly 9,000 registered voters and an apparently closely balanced partisan split, we might reasonably assume that several thousand copies were mailed, well over the 500-piece statutory threshold. TDC's disclosure reports to the state of New Jersey indicate that it paid bulk mailing postage in amounts ranging from \$450 to \$1,425 in several different instances, that it paid printing costs in different instances of between about \$550 to over \$1,200, and that it paid lesser amounts in several instances for mailing labels. Thus, it would appear likely that the TDC mailing at issue cost more than \$1,000. If the Commission were to pursue this or a like matter, the number of pieces mailed as well as the costs of the mailing and billboard would be subjects of factual investigation.

New Jersey law allows contributions in excess of amounts permitted by the FECA and from corporations and labor unions. Review of state election reports indicates that

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<sup>8</sup> Report of Contributions and Expenditures by the TDC (Nov. 19, 2004), *available at* <http://www.elec.state.nj.us/ElecWeb/StandardSearch.aspx> (visited Dec. 1, 2005).

<sup>9</sup> See *Weinberg v. Bergen County Democratic Org.*, No. BER-L-6479-05 (N. J. Super. Ct. Ch. Div. Sept. 20, 2005), *available at* <http://www.judiciary.state.nj.us/doyne/Weinberg1.pdf> (visited Dec. 1, 2005). The cited case involved a refusal to count the votes of a group described as the "Tenaflly Five" in a Democratic Party nomination contest. Perhaps the travails of the Tenaflly Two in this matter will lead to relief for them (and similarly situated candidates) as well.

<sup>10</sup> Cf. Resp. of Mary Jo Werner, Treasurer, Kind for Congress Comm., at 1-2 (Sept. 13, 1999), *In re Kind for Congress*, MUR 4920 (Fed. Election Comm'n).

TDC received contributions from at least two sources that appear to be corporate entities.<sup>11</sup> In addition, TDC was not registered with and did not report to the Federal Election Commission.<sup>12</sup> Finally, the mailing did not include a 441d-compliant disclaimer. See 2 U.S.C. § 441d.

Thus, the law is easily construed to require the TDC to pay for the mailing complained of entirely with Federal funds maintained in a segregated account, to include a Federally-prescribed disclaimer, and to report the receipt and spending of those funds to the Federal Election Commission.

## Discussion

The relevant provisions of Federal law were enacted as part of the BCRA in 2002. The Commission recognized that certain provisions of the law, including those implicated in this complaint, might be construed and enforced in a way that impinged severely on the activities of state and local candidates and political parties. The Commission made several regulatory decisions to attempt to ameliorate potential effects of the law on state and local candidates and parties. Directly related to this matter, the Commission by regulation excluded associations of state and local candidates from the requirement to pay for communications such as the TDC mailing with Federal funds. The Commission noted that there was absolutely no mention of this provision in debate on BCRA in Congress, and reasoned it implausible that Congress intended to federalize this and much other state and local election activity without any discussion of the issue. The Commission specifically cited reluctance to regulate candidates for city council or local school boards.<sup>13</sup> Thus, during 2004 TDC was exempted by regulation from the requirement to pay for communications promoting Federal candidates solely with federal funds.

In a similar vein, the Commission acted to exempt the first \$5,000 of certain types of FEA conducted by state or local parties or groups of candidates from otherwise applicable fundraising and reporting requirements (modeling this exemption on a

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<sup>11</sup> Report of Contributions and Expenditures by the TDC (Nov. 19, 2004) (referring to a contribution from D & C Honda of Tenaflly); Supplemental Contributor Information by the TDC (Oct. 14, 2005) (referring to a contribution from Gartner & Romero Management Co[.]), *available at* <http://www.elec.state.nj.us/ElecWeb/StandardSearch.aspx> (visited Dec. 1, 2005).

<sup>12</sup> While most candidates for local office raise most (in some cases all) of their campaign funds in amounts and from sources permissible under FECA, few local party organizations or candidate associations segregate their Federal and non-Federal funds or comply with the reporting requirements of 2 U.S.C. § 434.

<sup>13</sup> Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,070 (July 29, 2002).

statutory \$5,000 exemption for local party volunteer activities, at 2 U.S.C. § 431(4)(C)). The Commission also excluded the acquisition of voter lists from the Federal funds requirements.

For these and other examples of regulatory restraint, the Commission was sued by sponsors of BCRA, and these and other similarly-motivated regulations have now been ruled insufficient to ensure the Congressionally-intended reach of the statute or otherwise inadequately justified under the Administrative Procedure Act. *Shays v. FEC*, 337 F. Supp.2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). The Commission has already acted to repeal the \$5,000 *de minimus* exemption<sup>14</sup> and is currently reconsidering additional regulations.

Thus, not only is the Commission perhaps compelled to regulate certain activities of state and local candidates (and associations of candidates), it is also instructed that its reach must extend to local efforts that amount to less than \$5,000, and probably, given the language of the court decision ("truly *de minimus*"), as low as \$1,000.

If the law applied only to communications supporting or opposing federal candidates, it is likely that local candidates (and local political parties) would simply stop mentioning Federal candidates in their public communications. However, the Federal funds restrictions apply also to voter registration in certain time periods and to "voter identification, get out the vote activity, or generic campaign activity" whenever a Federal candidate is on the ballot, as well as to the salaries of any employees who spend as little as 25% of their time on such activities. 2 U.S.C. § 431(20)(A).

Thus, during the 2006 Borough elections the Tenaflly Democratic and Republican Party committees and any joint candidate committees (and their counterparts in various boroughs, villages, towns, townships, counties and cities across the country) may face a choice between raising Federally-restricted and reported funds on the one hand or limiting to less than \$1,000 their expenses for purchasing voter lists, voter identification (such as phone banks and precinct walks), voter registration, GOTV, and generic campaign activity. And, of course, committee officials will need to be up to date on the specific statutory and regulatory definitions of (and exceptions to) these various terms. If not, someone may file a complaint with a Federal agency in Washington. And, as a result of the *Shays* decision and the regulatory changes it mandates, the Commission may find itself unavoidably opening an investigation into the cost of a slate mailing, the text of a local phone bank, or the timing of a voter registration effort. Perhaps then rejected office-seekers will feel vindicated.

Of course, many local party committees are already out of the business of phone banking and other once-common organizational activities, transferring these once grassroots functions up to the state level (the Bergen County Republican and Democratic parties do not appear to have Federal committees either), but how will they manage

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<sup>14</sup> \$5,000 Exemption for Disbursements of Levin Funds by State, District, and Local Party Committees and Organizations, 70 Fed. Reg. 69,631 (Nov. 17, 2005).

council campaigns? Is it possible to run a Bergen County freeholder campaign with less than \$1,000 to spend on voter lists, voter identification, and GOTV? Is it now necessary to run such a campaign with overlapping state and Federal finance and reporting requirements? Is it practical to do so? These are serious questions the Commission now confronts in the wake of the *Shays* decision.

#### Purpose of Federal Funds Requirements

The drafters of BCRA apparently included "association[s] of state and local candidates" in the reach of Federal regulation because in some states, legislative caucuses and similar entities expend substantial amounts on, for instance, partisan GOTV efforts that clearly could have an effect on concurrent Federal elections. The Minnesota DFL House Caucus, for instance, raised over \$1.7 million in 2004, much of which was in amounts in excess of any applicable Federal contribution limit.<sup>15</sup> This Caucus contributed no funds to individual candidates, apparently spending much of its treasure on multiple candidates or other broad efforts.<sup>16</sup> Having observed (and attempting to stop) the migration of soft money from national to state party committees, it is understandable that BCRA's drafters sought to prevent other obvious alternative entities from replicating national and state party use of non-federal (soft) money in association with federal elections. At some point, however, the anti-circumvention rule becomes so expansive, and its potential impact on Federal elections so attenuated, as to be without obvious utility. That point is probably well short of Borough Council elections in Tenafly, New Jersey.

Leaving an over-expansive law (or, arguably, an over-expansive judicial interpretation) in place is hardly cost free. Even committed proponents of BCRA might acknowledge that effectively requiring council candidates in small municipalities to conduct their campaigns (or large parts thereof) in compliance with Federal limits, prohibitions and reporting requirements could be contrary to principles of good government, which presumably include local control of local elections.<sup>17</sup> Indeed, given

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<sup>15</sup> Report of Contributions to DFL House Caucus (2004), *available at* <http://www.cfboard.state.mn.us> (visited Dec. 1, 2005).

<sup>16</sup> We have not examined these expenditures in detail and intend no suggestion that any of those expenditures may have (or have not) implicated any of BCRA's FEA provisions, but do assume that Minnesota law likely did not prohibit the use of these funds for much of what BCRA defined as FEA.

<sup>17</sup> One representative of a special purpose lobbying organization that backed BCRA conceded recently that the "Federal prohibitions, limitations and reporting" requirement applied in a different context to national political parties might be unnecessarily restrictive. He insisted, however, that the only remedy for such statutory inflexibility was with Congress. Testimony of Donald Simon, Public Hearing on the Definitions of Solicit and Direct (Fed. Election Comm'n Nov. 15, 2005), *available at*

FECA's pre-emption provision, 2 U.S.C. § 453(a) (2002), the BCRA FEA rules could be read to permit local parties and candidates to raise and spend funds in excess of otherwise applicable state or local limits,<sup>18</sup> which may well be below applicable federal limits. *See generally Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

Of course, the Commission presumably may exercise prosecutorial discretion to ignore the smallest of apparent violations, but such decisions can be challenged, *see* 2 U.S.C. § 437g(a)(8) (1980), and it certainly will be argued that systematically ignoring violations as small as \$5,000 is contrary to the Commission's statutory mandate. *Cf. Shays, supra*. Moreover establishing a law that large numbers of people are likely to violate while intending to ease administration or ameliorate ill-effects through lax enforcement profoundly undermines respect for the law and fosters cynicism about government. Moreover, an overbroad but ill enforced statute creates the conditions for capricious enforcement, varying at least with the knowledge or willingness of local political actors to file complaints with federal agencies even if the Commission itself is successful in applying a relatively even hand.

## Remedies

Should Congress (perhaps at the urging of local candidates and parties) wish to remedy this situation, several alternatives are available. Through its now disallowed regulatory exemptions the Commission suggested several. Following the 1976 election cycle Congress apparently concluded that the 1974 amendments to the FECA had been unduly restrictive for local party committees, and approved several statutory changes intended to allow local party committees a bit more breathing room below Federal controls,<sup>19</sup> including a \$5,000 threshold for certain activities, and exemptions for certain volunteer activities. Allowing for inflation in the 28 intervening years, an equivalent threshold today would be several times as high, and might allow campaigns such as those in Tenaflly to operate free of the threat of FEC investigation. Similarly, local campaigns are typically largely volunteer efforts, and appropriate volunteer exemptions might allow most local campaigns to operate outside Federal controls. If Congress determines that some associations of state candidates (such as large legislative caucuses) must remain bound by BCRA's FEA restrictions, perhaps associations of local candidates (at least those within a single local jurisdiction) could be exempted.

More fundamentally, Congress may wish to re-examine the BCRA rule that virtually any mention of a Federal candidate and virtually any activity by a state or local party coincident with a Federal election triggers a Federal funds requirement (and

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[http://www.fec.gov/pdf/nprm/definition\\_solicit/2005-11-15\\_Hearing\\_Transcript.doc](http://www.fec.gov/pdf/nprm/definition_solicit/2005-11-15_Hearing_Transcript.doc).  
(visited Dec. 1, 2005).

<sup>18</sup> Advisory Op. 2000-24, 2000 WL 33134619 (Fed. Election Comm'n Dec. 18, 2000).

<sup>19</sup> Pub. L. No. 95-216, 91 Stat. 1565, § 502 (1977).

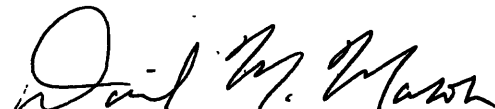


attendant federal registration and regulation). The links among Federal, state and local candidates in American elections extend deep into the history of the Republic. *Safire's Political Dictionary*, for instance, credits popularization of the term "coattails" to 1848 remarks by Congressman Abraham Lincoln who was describing Jacksonian party politics of some 20 years earlier.<sup>20</sup> Even earlier, Lincoln's political hero, Thomas Jefferson, integrated federal and state Republican efforts in his 1800 campaign for the presidency.

Presumably the sort of volunteer grassroots politics that characterizes Tenafly Borough Council campaigns and most other local party activity is an antidote to, rather than a manifestation of, big money politics. Surely there are ways short of imposing federal regulations and reporting requirements on local phone banks and mailings costing as little as \$1,000 to prevent local parties and candidates from becoming conduits for big money evasions of Federal campaign finance laws.



Michael E. Toner  
Vice Chairman



David M. Mason  
Commissioner

December 7, 2005

<sup>20</sup> WILLIAM SAFIRE, *SAFIRE'S POLITICAL DICTIONARY* 125 (1978); *see also id.* 317-18 (defining "Hymie's Ferryboat").

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